Biccari Bollo Mariano Inc

MEMORANDUM – WATCHING BRIEF

DATE: 24 OCTOBER 2019

MATTER: STENERSEN AND TULLEKEN ADMINISTRATION CC // LINTON PARK BODY CORPROATE AND COMMUNITY SCHEMES OMBUD SERVICES

CASE NO: A3034/2018

ATTENTION: SHEENA GROENEWALD

FROM: LISA GOVENDER

COURT: HIGH COURT OF SOUTH AFRICA, GLD

OPPOSED/UNOPPOSED: OPPOSED

COURT ROOM: 6A

TIME SPENT AT COURT: 30 MINUTES

ACTUAL TIME SPENT IN COURT: 15 MINUTES

JUDGE: **JUDGE MATOJANE**

OUTCOME OF THE MATTER:

I confirm that the Appellant and Respondents introduced themselves to Honourable Judge Matojane. I confirm that Judge Matojane made reference to section 57 of the Community Schemes Ombud Services Act 9 of 2011. I confirm further that Judge Matojane handed down three typed copies of the Judgment and then excused himself from the court room. Kindly find attached a copy of the Judgment.

Kind regards,

Lisa Govender

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3034/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

24 OCT 2019

SIGNATURE DATE

In the matter between:

STENERSEN AND TULLEKEN ADMINISTRATION CC Appellant

and

LINTON PARK BODY CORPORATE First Respondent

COMMUNITY SCHEMES OMBUD SERVICE ADJUDICATOR Second Respondent

and

COMMUNITY SCHEMES OMBUD SERVICE *Amicus curiae*

JUDGMENT

The Court

[1] This judgment concerns a statutory appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 (the 'CSOS Act' or the 'Act') against the adjudicator's order in a matter submitted by the appellant for determination in terms of the Act.

[2] Neither the Act nor the Uniform Rules of Court prescribe a procedure for bringing an appeal as contemplated in s 57. The appellant noted an appeal against the whole of the adjudication order granted by the adjudicator by filing a notice of appeal and a record, which notice was served on both the respondents. The appellant followed the provisions of Rule 50 of the Uniform Rules of Court, which relates to appeals from the Magistrate Court. It delivered a notice of set down at least 20 days before the hearing of the appeal in terms of Rule 50(5) of the Uniform Rules of Court.

[3] Shortly before the matter was to be heard, the Western Cape High Court delivered a judgment in the matter referred to as the *Trustees, Avenues Body Corporate v Shmaryahu and Another*.[1] Binns-Ward and Langa AJ in that judgment, held that:

'An appeal in terms of s 57 is not a "civil appeal" within the meaning of the Superior Courts Act 10 of 2013. What may be sought in terms of s 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals defined in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590 – 591.

The proper manner in which such an appeal should be brought in the circumstances is upon notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff.'[2]

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[1] *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2015 (4) SA 586 (WCC)
[2] Ibid paras 25-26

[4] The Court also stated that the application should be served on the Community Schemes Ombud Service ('CSOS' or the 'Ombud') as well as the adjudicator who made the determination.[3]

[5] Following the above decision the Acting Chief Ombud of CSOS issued a Practice Directive stating that the relief available in terms of s 57 is closely analogous to that which might be sought on judicial review and that the appeal should be brought by notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff.[4]

[6] The KwaZulu-Natal High Court in the matter of *The Body Corporate of Duroc Centre v Singh*,[5] followed the procedure as prescribed by the Western Cape High Court.

[7] In this Division, a practice has developed whereby appellants have successfully dealt with the matter by delivering the notice of appeal and following the procedures set out in Uniform Rules of Court for noting an appeal.[6]

[8] Because of the divergent approaches of the various divisions of the High Court, the Judge President of this Division issued a directive in terms of s 14(1) of the Superior Court Acts 10 of 2013 constituting a Full Court for the purpose of determining the manner and procedure to be followed when noting such an appeal.

The issue

[9] The Court is called upon to determine which category of appeals an appeal brought in terms of s 57 of the Act falls into; and what process must be followed by an appellant in launching such an appeal.

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[3] Ibid para 26.
[4] Practice Directive on Dispute Resolution No. 1 of 2019, issued in terms of s 36 of the CSOS Act, which came into effect on 1 August 2019 (the 'Directive').
[5] *The Body Corporate of Duroc Centre v Singh* (AR99/18) [2019] ZAKZPHC 29 (13 May 2019).
[6] See *Waterfall Hills Residents Association NPC v Jordaan and Another* (A3140/2018) [2018] ZAGPJHC 669 (12 November 2018).

The legal framework regulating adjudications

[10] The CSOS Act establishes the Community Schemes Ombud Service, whose purpose is to develop and provide an expeditious and informal cost-effective dispute resolution mechanism in respect of 'community schemes'.[7] Community schemes are defined in the CSOS Act as 'any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing co-operative...'

[11] A dispute is defined as 'a dispute regarding the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.'

[12] The CSOS Act seeks to promote good governance of community schemes and to monitor that governance; to provide training for conciliators, adjudicators and other employees of the CSOS; and to take custody of, preserve and provide public access to scheme governance documentation.

[13] Section 38(1) of the CSOS Act deals with the procedure to be followed in the event that a party to a dispute wishes it to be adjudicated by the Ombud. It provides that any person may make an application for dispute resolution if such person is a party to or affected materially by a dispute. The application must be made in the prescribed manner and can, as required by Practice Directive, be downloaded from the website of CSOS and lodged with the Ombud, together with the prescribed application fee.[8]

[14] In terms of the Practice Directive, the applicant bears the onus of ensuring that all the relevant information necessary, to "make their case" is set out in the Application for Dispute Resolution Form, which includes the attachment of any

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[7] See s 2 of the CSOS Act and the long title.
[8] Directive 5 of the 2019 Practice Directive

documents pertinent to the claim.[9] In other words, the applicant must set out the grounds to meet the legislative requirements of the relief sought.

[15] The applicant is required to include statements setting out the relief sought, which relief must be within the scope of one or more of the prayers for the relief contemplated in s 39 of the CSOS Act.[10] The latter section sets out the various types of substantive relief, which an adjudicator is empowered to grant in terms of the Act and relates to financial issues, behavioural issues, scheme of governance issues, meetings, management services, works pertaining to private areas and common areas, as well as other general issues.

[16] Upon receipt of the application, a CSOS case manager may request clarification of the application, or additional information and documentation so that the requirments of the CSOS Act are met.[11]

[17] Once an application has been successfully lodged, CSOS is obliged to give notice of the application to all affected parties and invite them to make their written submissions. The applicant then gets the right to reply to issues raised by the affected parties in their replying papers.[12]

[18] The Ombud may refer the matter to conciliation if it believes that there is a reasonable prospect of a negotiated settlement.[13] If the conciliation fails, the matter is referred to an adjudicator, and the parties may choose an adjudicator from the Ombud's list and, if they are unable to agree with one another in this regard, the Ombud may select the adjudicator.[14]

The powers of the adjudicator

[19] Section 50 of the CSOS Act provides that in the process of investigating an application to decide whether it would be appropriate to make an order, the adjudicator must observe the principles of due process of law. The adjudicator is

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[9] Ibid.
[10] Ibid Directive 7.
[11] Ibid Directive 11.
[12] Ibid Directive 14.
[13] Section 47 of the CSOS Act.
[14] Ibid s 48.

called upon to act quickly, and with as little formality and technicality as is consistent with the proper consideration of the application. The adjudicator must also consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.

[20] The adjudicators play an active part in the adjudication process. Their investigative powers extend to requiring the applicant, managing agent or a relevant person to: give to the adjudicator further information or documentation; to give information in the form of an affidavit or statement, and to come to the office of the adjudicator for an interview. The adjudicator is permitted to enter and inspect the following: an association's asset, record or other documents; and any private area or common area, including a common area subject to an exclusive use arrangement.[15]

[21] The adjudicator may dismiss the application if the adjudicator considers the application to be frivolous or vexatious, or if the applicant fails to comply with a requirement of the adjudicator in terms of section 51.[16]

[22] The parties to the dispute are not entitled to legal representation during the adjudication process, unless all parties to the proceedings consent thereto. The adjudicator may also permit the parties to have legal representation if it would be unreasonable to expect a party to deal with the adjudication without legal representation. In this regard the adjudicator must exercise his or her discretion after considering the nature of the questions of law raised by the dispute; the relative complexity and importance of the dispute; and the comparative ability of the parties to represent themselves.[17]

[23] In terms of s 56 of the Act, an order handed down by an adjudicator must be enforced as if it were a judgment of the High Court or Magistrate Court, depending on the jurisdiction. The relevant court official must, upon lodgement of the order, register it as an order of such court.[18]

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[15] Ibid s 51.
[16] Ibid s 53.
[17] Ibid s 52.
[18] Ibid s 56(1) and (2).

Right of appeal, regulations and Practice Directives

[24] Section 36(1) of the CSOS Act mandates the Chief Ombud to issue practice directives regarding any matter pertaining to the operations of CSOS. On 1 August 2018, the Chief Ombud issued Practice Directive 2 of 2018, headed 'Practice Directive on Dispute Resolution'. It was brought into effect on that same date. However, this Practice Directive was repealed and replaced after the decision made in the *Shmaryahu* case. The Practice Directive on Dispute Resolution 1 of 2019 came into effect on 1 August 2019 and incorporated the findings of the Western Cape High Court in Part 8 of the Practice Directive, which deals with the appeal process.

[25] The former Practice Directive distinguished between two distinct processes: an 'appeal on a question of law' and a 'review process' which could be brought in terms of Rule 53 of the Uniform Rules of Court. In this regard, Practice Directive 34, titled 'When to Lodge an Appeal' provided as follows:

'A person who is not satisfied with the Adjudicator's order, may lodge an appeal in the High Court on the question of law or follow the review process in terms of the provisions of Rule 53 of the Uniform Rules of Court.'

[26] It, therefore, appeared to provide the applicant with a choice to pursue either an appeal or review process. This has been amended in that the Practice Directive now reads:

34. **WHEN TO LODGE AN APPEAL**

34.1 A person who is not satisfied with the Adjudicator's order, may lodge an appeal in the High Court on a question of law.

34.2 Following the High Court decision in the Western Cape High Court, in a matter of *The Trustees for the time being of the Avenues Body Corporate v Shmaryahu and* Another, the following procedure is prescribed for all appeals in terms of s 57 of the CSOS Act, until such time that the Full Bench of the High Court has made a determination or order on the process to be followed for appeals under section 57 of the CSOS Act:

34.2.1 An appeal in terms of s 57 is not a 'civil appeal' within the meaning of the Superior Courts Act 10 of 2013.

34.2.2 What may be sought in terms of s 57 is an order from the court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law.

34.2.3 The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review.

34.2.4 The appeal should be brought by notice of motion supported by affidavit(s), which should be served on the respondent parties by the sheriff.

34.2.5 Both the Adjudicator and CSOS should be cited as respondents.

34.2.6 Whilst the Adjudicator or CSOS might be expected in the ordinary course to abide by the judgment of the court, there will be cases in which the Adjudicator or CSOS might nevertheless consider that it might be helpful to file a report for the court in respect of any aspect of fact or law not dealt with in the adjudication order.

34.2.7 If the Adjudicator's order has been registered as an order of the court in terms of s 56 of the CSOS Act, notice of the proceedings must be lodged with the registrar or clerk of the court concerned, for the expunging of the registration from the court's records.

[27] Furthermore, concerning the role of CSOS in the 'appeal process', the previous Practice Directive stated that:

'35.3 CSOS will lodge with the Registrar of the Court, the record of proceedings as set out in Rule 53 in the Uniform Rules of Court.

35.4 In terms of Rule 53(3) of the Uniform Rules of Court, the costs of transcription, if any, shall be borne by the applicant in the Appeal proceeding and shall be the costs in the cause.'

[28] These two provisions have not been carried through into the new Practice Directive. As such, the Practice Directive no longer appears to provide a party with the choice of opting for either an 'appeal' (as ordinarily understood) and a 'review', under s 57 of the CSOS Act, which had contributed to the confusion amongst parties as to the meaning of 'appeal' as set out in s 57 if the CSOS Act, and the appropriate procedure to be followed.

[29] The Practice Directive also sets out the powers of the adjudicator and the nature of the role, providing that:

29.1 The adjudicator enjoys the same privileges and immunities from liability as a Judge of the High Court;[19]

29.2 The adjudicator shall determine the dispute based on oral submissions, written documents and/or inspection of work related to the dispute, as appropriate;[20]

29.3 The adjudicator may make use of his or her specialist knowledge to arrive at an appropriate determination;[21]

29.4 If the adjudicator decides not to dismiss the application, he/she must inter alia, make an order granting or refusing the relief and include a statement with the adjudicator's reasons for the order;[22] and

29.5 The adjudicator's order is enforceable in the court having jurisdiction be that the Magistrate Court or the High Court.[23]

The interpretation of s 57 of the CSOS Act

[30] The issue in this matter turns on the interpretation to be accorded to s 57 of the CSOS Act. Section 57, titled 'Right of appeal', provides as follows:

'(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals against an order may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.'

[31] A preliminary point to take note of is that no leave to appeal is required to be given by the statutory body. An appeal against an order may not be made after 30 days has elapsed. A specific question of law must be identified. It is that question

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[19] Practice Directive 26.4 of the Practice Directive on Dispute Resolution No.1 of 2019.
[20] Ibid Directive 26.5.6.
[21] Ibid Directive 26.6.3.
[22] Section 54(1) of the CSOS Act.
[23] Ibid s 56.

that must be considered by the High Court, and it will not be open to the court later hearing the appeal to consider additional issues. Speed, economy and finality is the reason the legislature limited the appeal process.

[32] The determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections. For this reason, an appeal court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.

[33] Put differently, the appeal court is limited to considering whether the adjudicator—

33.1 applied the correct law;

33.2 interpreted the law correctly, and/or

33.3 properly applied the law to the facts as found by the adjudicator.

[34] The conclusions drawn from the evidence (i.e. the 'findings of fact') made by the adjudicator cannot be re-considered on appeal.

[35] In essence, by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record. This demonstrates not only the need to finally resolve disputes of fact at adjudication level, but also the necessity of avoiding or limiting the number of appeals brought to the High Court, thereby alleviating the burden of the High Court in dealing with matters of this nature. This ensures that cases are dealt with in an uncomplicated and expeditious manner. To conclude otherwise would defeat the purpose of what the CSOS Act seeks to achieve.

The appeal record

[36] The *amicus curiae* in this matter, CSOS, raised a concern in relation to the costly expense of ensuring that all adjudication hearings are recorded so that they

may be transcribed for the purposes of forming part of an appeal record, should the matter ever go on appeal.

[37] In this Court's view, the application filed with CSOS, any subsequent exchange of written submissions between the parties for the adjudication, together with the written reasons for the determination which the adjudicator is required to provide, are sufficient for purposes of forming an appeal record – particularly in light of the fact that the appeal is narrowed down to a question of law, where the facts are no longer in dispute.[24]

[38] For this reason, we also deem it sufficient for the appeal to be brought by way of a notice of appeal, which sets out the grounds of appeal, as opposed to being brought by way of a notice of motion supported by affidavit(s).

Categories of appeals

[39] The parties in this matter rely upon the oft-cited case of *Tikly and Others v Johannes NO and Others*,[25] where Trollip J considered the nature of an appeal, stating as follows:

'The word "appeal" can have different connotations In so far as is relevant to these proceedings it may mean:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not,

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[24] Practice Directive 28 of the Directives on Dispute Resolution (No. 1 of 2019) requires the adjudicator to provide written reasons within 14 days of the final hearing, and to include reasons for the decisions.

[25] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T).

but whether the arbiters had exercised their powers and discretion honestly and properly...'[26]

[40] This formulation from *Tikly* has been affirmed in many cases, and was recently adopted by the Constitutional Court which stated that:

'...it can be seen that the three types of appeals that may fall under the word "appeal" are an appeal in the wide sense, an appeal in the ordinary strict sense and a review....'[27]

[41] In terms of s 173 of the Constitution, the High Court has the inherent power to protect and regulate its process, and to develop the common law, taking into account the interests of justice. Inherent jurisdiction may include the power to grant procedural relief where rules of court do not provide for a particular set of circumstances. Section 39 of the Constitution enjoins the court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights.

Conclusion

[42] Our answer to the question posed in paragraph 9 above is that an appeal to the High Court against a decision of the adjudicator contemplated in s 57 is an appeal in the ordinary strict sense – the second category of appeal mentioned in the *Tikly* case with the proviso that the right of appeal is limited to questions of law only. The court is limited to the record and the adjudicator's order and reasons. In such an appeal, the question for decision is whether the order of the statutory body performing a quasi-judicial function was right or wrong on the material which it had before it. For these reasons, we differ from the findings of the Court in *Shmaryahu*.[28]

[43] Accordingly, we find that an appeal in terms of s 57 of the Act is a re-hearing on the merits, but limited to the evidence or information on which the decision under appeal was given, and in which the only determination to be made by the court of appeal is whether that decision was right or wrong in respect of a question of law.

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[26] Ibid at 590-591.
[27] *National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd) 2017 (7) BCLR 851 (CC) para 135. Judgment by Zondo J (Mogoeng CJ, Jafta J and Mhlantla J concurring). Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) at para 41; *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC) at para 114
[28] *Shmaryahu* (note 1 above).

[44] We note that the *lis* between the parties have became settled during the hearing.

THE ORDER

1. The following procedure is prescribed for all appeals on the question of law contemplated in s 57 of the CSOS Act:

(a) The appeal should be brought by way of notice of appeal where the grounds of appeal are set out succinctly.

(b) The notice should be served on the respondent parties by the Sheriff.

(c) Both the adjudicator and CSOS should be cited as respondents.

(d) While the adjudicator or CSOS might be expected to abide the judgment of the court, nothing precludes them from filing a report for the court in respect of any aspect of the law which they might consider to be helpful to the court.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

L R ADAMS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

PP

P L NOBANDA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	13 June 2019
Date of judgment:	24 October 2019

Appearances:

Counsel for the Appellant:	Adv. D Watson; Adv. N Komar
Instructing Attorneys:	Scalco Attorneys
Counsel for the First Respondent:	Adv. McTurk
Instructing Attorneys:	Otto Krause Inc
For the *amicus curiae*:	Adv. Nalane SC; Adv. Makapela
Instrucuting Attorneys:	Werksmans Attorneys